

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY,

Plaintiff

v.

JEFF TORTORA, et al.,

Defendants

Case No.: 2:20-cv-00078-APG-BNW

**Order Denying Motion to Supplement and
Granting Motion for Summary Judgment**

[ECF Nos. 36, 43]

Defendant Jeff Tortora was performing on stage at a club as part of a rock band called Tinnitus. Co-defendant Daniel Facchian was in the crowd and gestured at Tortora to jump off the stage and crowd-surf, while indicating that he and others would catch Tortora. Tortora granted Facchian's wish, jumped off the stage, and landed on Facchian. Apparently displeased with the results, Facchian sued Tortora and the club operators in state court for personal injuries. Allstate Property and Casualty Insurance Company (Allstate) is defending Tortora in the underlying suit under a homeowners insurance policy that it issued to him. Allstate filed this lawsuit in this court seeking a declaration that it has no duty to defend or indemnify Tortora.

Allstate moves for summary judgment, arguing it has no duty to defend or indemnify Tortora due to three exclusions in the insurance policy for business activities, professional services, and liability assumed out of a contract or agreement. Facchian opposes, arguing that Tortora testified he was performing as a hobby or for the fun of entertaining and not as a business pursuit.¹ Facchian also argues that whether Tortora was acting in furtherance of a

¹ Facchian also argues that Allstate cannot seek declaratory relief because it has suffered no injury and the requested relief would not redress Allstate's claimed injury because Allstate may

1 business pursuit is a question that is best left for resolution in the state court proceeding.
2 Defendants TCB Las Vegas, LLC and Count's Kustoms, LLC (the club operators) joined
3 Facchian's response.

4 After summary judgment briefing was complete, TCB and Count's moved for leave to
5 supplement their joinder. TCB and Count's advise the court that Tortora and Facchian were
6 settling Facchian's claims in the underlying lawsuit and that Allstate was providing the payment
7 for the settlement. TCB and Count's argue that this shows that Allstate believes there is
8 coverage under the policy or it would not offer to pay to settle the underlying lawsuit. Allstate
9 opposes supplementation, arguing that there is no good cause for the supplement and that
10 settlement offers are not admissible to prove Allstate's liability to defend or indemnify.

11 The parties are familiar with the facts, so I repeat them here only as necessary to resolve
12 the motions. I deny the motion to supplement because even if I considered the proffered
13 evidence, Allstate's decision to pay a cost of defense settlement does not tend to prove that it
14 concedes there is coverage under the policy. I grant Allstate's motion for summary judgment
15 because no genuine dispute remains that the business activities exception applies.

16 **I. MOTION TO SUPPLEMENT (ECF No. 43)**

17 Under Local Rule 7-2(g), a party may not supplement briefs "without leave of court
18 granted for good cause." TCB and Count's have not shown good cause for supplementing their
19 joinder to Facchian's opposition. The fact that Allstate is willing to contribute money to settle
20 Facchian's claim in the underlying lawsuit is not an admission that there is coverage under the
21 policy. By these defendants' own evidence, the settlement money is characterized as "costs of
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commit bad faith conduct in the underlying lawsuit. I rejected these arguments in a prior order
and there is no basis to reconsider that ruling. *See* ECF No. 35.

1 defense money of \$15,000 to resolve” the underlying state court case. ECF Nos. 43-2 at 4; 43-3
 2 at 2. That is not an admission that coverage exists because Allstate is defending Tortora in the
 3 underlying litigation under a reservation of rights. ECF Nos. 1 at 3; 27 at 1. I therefore deny
 4 supplementation.

5 **II. MOTION FOR SUMMARY JUDGMENT (ECF No. 36)**

6 Summary judgment is appropriate if the movant shows “there is no genuine dispute as to
 7 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
 8 56(a). A fact is material if it “might affect the outcome of the suit under the governing law.”
 9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if “the evidence
 10 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

11 The party seeking summary judgment bears the initial burden of informing the court of
 12 the basis for its motion and identifying those portions of the record that demonstrate the absence
 13 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The
 14 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a
 15 genuine issue of material fact for trial. *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th
 16 Cir. 2018) (“To defeat summary judgment, the nonmoving party must produce evidence of a
 17 genuine dispute of material fact that could satisfy its burden at trial.”). I view the evidence and
 18 reasonable inferences in the light most favorable to the non-moving party. *Zetwick v. Cnty. of*
 19 *Yolo*, 850 F.3d 436, 440-41 (9th Cir. 2017).

20 The interpretation of an insurance contract is a question of law for the court. *Powell v.*
 21 *Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (Nev. 2011). “An insurance policy should be read
 22 as a whole, and its language should be analyzed from the perspective of one untrained in law or
 23 in the insurance business. Policy terms should be viewed in their plain, ordinary and popular

1 connotations.” *Fourth St. Place v. Travelers Indem. Co.*, 270 P.3d 1235, 1239 (Nev. 2011)
 2 (quotation omitted). “[C]lauses excluding coverage are interpreted narrowly against the insurer.”
 3 *Powell*, 252 P.3d at 672 (quotation omitted). To prove an exclusion excludes coverage under a
 4 policy, the insurer must 1) “write the exclusion in obvious and unambiguous language,” 2) show
 5 the insurer’s proposed interpretation is the only fair interpretation of the exclusion, and 3) show
 6 the exclusion clearly applies to the claim at hand. *Id.* at 674. “Ultimately, a court should
 7 interpret an insurance policy to effectuate the reasonable expectations of the insured.” *Id.* at 672
 8 (quotation omitted).

9 The policy provides coverage under Coverage X Family Liability Protection for
 10 “damages which an insured person becomes legally obligated to pay because of bodily injury or
 11 property damage arising from an occurrence to which this policy applies, and is covered by this
 12 part of the policy.” ECF No. 36-3 at 53. Coverage Y also provides coverage for reasonable
 13 medical expenses for bodily injuries caused by the insured’s activities. *Id.* The policy excludes
 14 from Coverages X and Y bodily injury “arising out of the past or present business activities of an
 15 insured person.” *Id.* at 54, 56. Business is defined as “any full- or part-time activity of any kind
 16 engaged in for economic gain” *Id.* at 33.

17 The Supreme Court of Nevada has held that a similar business pursuits exclusion was
 18 “clear and unambiguous.” *Dwello v. Am. Reliance Ins. Co.*, 990 P.2d 190, 191-92 (Nev. 1999)
 19 (excluding bodily injury arising out of “business pursuits,” including “occasional or part-time
 20 business pursuits”). To determine whether the activity in question falls within a business
 21 pursuits exclusion under *Dwello*, I consider “(1) whether the pursuit involves a continuity or
 22 customary engagement in the activity; and (2) whether the activity involves a profit motive.” *Id.*
 23 at 192.

1 Tortora's regular occupation is as a percussionist for the Blue Man Group. ECF No. 36-5
2 at 6. He and other professional musicians play for the band Tinnitus in addition to their regular
3 jobs. ECF No. 36-4 at 5, 7, 13-14. Tinnitus was formed in 2008. *Id.* at 7. The band performed
4 approximately 15 times at Count's in the five years preceding the stage-jumping incident, and
5 about eight to ten times at other venues within this same time period. ECF No. 36-5 at 6-7.

6 The band is paid for its performances in the United States.² ECF Nos. 36-2 at 11; 36-4 at
7 7; 36-5 at 4, 9. Tinnitus was initially paid \$600 per performance at Count's, which was later
8 increased to \$1,200 for a 90-minute performance. ECF Nos. 36-4 at 9; 36-5 at 5-6. The band
9 splits the payment equally among its six members. ECF No. 36-5 at 4, 6. The compensation is
10 not sufficient for Tortora to support himself, but the band required "a certain budget to get paid,
11 because [the performers were] not going to do it for free." ECF No. 36-4 at 9. Although the band
12 required payment to perform, Tortora also testified that he played in the band for fun, that it was
13 "not a financial enterprise" for him, and that performing with Tinnitus "just . . . feeds the soul."
14 *Id.* at 28. He also described his playing with Tinnitus as a hobby. *Id.* at 30. But he
15 acknowledged that if the band was offered a "corporate gig," he "would take it." *Id.* at 28.

16 No genuine dispute remains that the business activities exclusion applies because
17 Tortora's performances with Tinnitus constitute part-time activity engaged in for economic gain
18 as defined in the policy. Under *Dwello*, the activity involved customary or continuous
19 engagements and involved a profit motive. Although Tinnitus performed only a few times each
20 year, it has existed since 2008 and played both internationally and domestically. The band
21 would not play in the United States without being paid, its compensation at Count's doubled over
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23 ² The band did some unpaid performances in other countries while the Blue Man Group was on
international tours. ECF No. 36-4 at 8.

1 time, each band member received \$200 for a 90-minute performance, and if offered other gigs,
2 the band would have taken them. The mere fact that the band members had other main sources
3 of income or that they also played for the joy of entertaining does not negate economic gain or a
4 profit motive. Because the business activities exception applies, Allstate is entitled to a
5 declaration that it has no duty to indemnify or defend Tortora in the underlying state court action.
6 *United Nat'l Ins. Co. v. Frontier Ins. Co. Inc.*, 99 P.3d 1153, 1158 (Nev. 2004) (en banc) (stating
7 there is no duty to defend or indemnify where there is no actual or potential coverage under the
8 policy).

9 Facchian argues that the question of whether Tortora was engaged in a business activity
10 is best resolved in the underlying state court action. But there is no indication that this question
11 will be litigated in that case. That case is one for negligence by Facchian against Tortora and the
12 club operators. ECF No. 1-1. Facchian has not explained how that action will inquire into
13 whether Tortora was involved in a business activity for purposes of the Allstate policy when he
14 jumped off the stage and onto Facchian.³ I therefore grant Allstate's motion for summary
15 judgment.

16 **III. CONCLUSION**

17 I THEREFORE ORDER that defendants TCB Las Vegas, LLC and Count's Kustoms,
18 LLC's motion for leave to file supplemental joinder **(ECF No. 43) is DENIED.**

19 I FURTHER ORDER that plaintiff Allstate Property and Casualty Insurance Company's
20 motion for summary judgment **(ECF No. 36) is GRANTED.** I hereby declare that plaintiff
21 Allstate Property and Casualty Insurance Company owes no duty to defend or indemnify
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23 ³ If the state court action is being settled, as TCB and Count's assert in their motion to supplement, then the question will not be resolved in that case even if it somehow were at issue.

1 defendant Jeff Tortora in the underlying litigation *Facchian v. TCB Las Vegas, LLC, et al.*, No.
2 A-19-796631-C. The clerk of court is instructed to enter judgment accordingly in favor of
3 plaintiff Allstate Property and Casualty Insurance Company and against the defendants, and to
4 close this case.

5 DATED this 10th day of March, 2022.

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8 ANDREW P. GORDON
9 UNITED STATES DISTRICT JUDGE
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